

**Iowa Department of Natural Resources
Environmental Protection Commission**

ITEM

14

DECISION

TOPIC

APPEAL OF CONTESTED CASE DECISION - DAN WITT

Dan Witt

On June 13, 2000, the department issued Administrative Order No. 2000-AFO-05 to Dan Witt for violations of department rules regarding animal feeding operations. The order required Mr. Witt to comply with certain animal feeding operation requirements and pay a penalty of \$3,000. That action was appealed. A hearing regarding the appeal of the order was held on November 27, 2007 and the administrative law judge (ALJ) issued a Proposed Decision on December 14, 2007. At the time of the hearing, the animal feeding operation that was the subject of the department's order had been depopulated and hence, the only issue left to be resolved was the penalty amount. In the Proposed Decision, the ALJ reduced the penalty to \$1,500, in large part due to the length of delay between issuance of the order and the actual hearing regarding this matter.

On March 7, 2008, the department received an appeal of the proposed decision from Mr. Witt. The proposed decision, Mr. Witt's appeal, and the department's reply brief will be provided to the Commission. Mr. Witt requested oral arguments and the Commission will hear oral arguments from Mr. Witt and the department. The Commission is requested to review this appeal and render a final agency action.

Edmund J. Tormey, Chief
Legal Services Bureau

August 22, 2008

BEFORE THE IOWA ENVIRONMENTAL PROTECTION COMMISSION

IN THE MATTER OF:

DAN WITT

DEPARTMENT'S APPEAL BRIEF

DIA NO: 07DNR006

On June 13, 2000, the Department of Natural Resources (Department) issued Administrative Order No. 2000-AFO-05 (order) to Dan Witt for violations of Department rules regarding animal feeding operations. The order required Mr. Witt to comply with certain animal feeding operation requirements and pay a penalty of \$3,000.00. That action was appealed. A hearing regarding the appeal of the order was held on November 27, 2007 and the administrative law judge issued a Proposed Decision on December 14, 2007. At the time of the hearing, the animal feeding operation that was the subject of the Department's order had been depopulated and hence, the only issue left to be resolved was the penalty amount. In the Proposed Decision, the administrative law judge affirmed the violations, but reduced the penalty to \$1,500.00. Mr. Witt has appealed the proposed decision.

STATEMENT OF FACTS

Dan Witt owned and operated a swine feeding facility located in Section 31, T82N, R6E, Clinton County, Iowa. The facility consisted of two nursery confinement buildings, two Cargill units, and an open feedlot with approximately 420 animals. The facility was located north of a county highway and adjacent to a grass waterway that drained through a county culvert to the south. *Department's Exhibit 2*. The waterway is an unnamed tributary of Harts Mill Creek.

On June 7, 1989, the Department's Field Office 6 (Field Office 6) investigated a complaint of feedlot runoff at Mr. Witt's facility. During the investigation, Field Office 6 personnel observed dried waste solids in the county road ditch and the waterway. On June 12, 1989, Mr. Witt was issued a Notice of Violation letter for the runoff of manure solids that had accumulated in a county road ditch and waterway. Mr. Witt was required to submit a waste management plan to Field Office 6 by August 10, 1989. *Department's Exhibit 11*.

In May 1997, Field Office 6 investigated a complaint regarding improper manure application and improper disposal of dead hogs at Mr. Witt's facility. During the investigation Field Office 6 personnel observed dead hogs in the field and noted the separation distance between the waste application area and a neighboring well had not been met. On May 16, 1997, Mr. Witt was issued a Notice of Violation letter for the improper disposal of dead hogs and land application of manure too close to a well. *Department's Exhibit 12*.

On June 5, 1997, Field Office 6 investigated a complaint of feedlot runoff at Mr. Witt's facility. During the investigation, Field Office 6 observed a breach in the retaining wall of the open feedlot. In a letter dated June 30, 1997, Field Office 6 required Mr. Witt to submit a Natural Resources Conservation Service (NRCS) assessment of the facility's waste management practices by August 15, 1997. *Department's Exhibit 13.* On September 30, 1997, Field Office 6 contacted Mr. Witt because the assessment had not been submitted. Mr. Witt stated NRCS visited his facility on June 27, 1997 and recommended repair to the retaining wall. He stated he had not fixed the retaining wall yet. *Department's Exhibit 10.*

On August 9, 1999, Field Office 6 investigated a complaint of manure runoff at Mr. Witt's facility. Field Office 6 personnel observed a large pool of manure in a cornfield to the east of the facility, with the first few rows of corn burned and yellow in color. Field Office 6 personnel observed manure solids in the grass waterway between the facility and the cornfield and in the county road culvert to the south of the area. The manure solids in the grass waterway had the appearance of black muck. A breach in the retaining wall of the feedlot was also observed and manure was being discharged into the culvert. On August 16, 1999, Field Office 6 personnel returned to Mr. Witt's facility and collected samples from the county road ditch south of the culvert. The results indicated high levels of fecal coliform, ammonia, Biological Oxygen Demand (BOD), and total suspended solids. *Department's Exhibits #3 and #5.* Field Office 6 observed manure overflowing from the confinement buildings onto the adjacent ground and Mr. Witt stated he only had enough storage capacity to hold manure for two weeks and that he did not own enough ground to spread the manure. Field Office 6 recommended Mr. Witt contact NRCS for assistance in preparing an assessment of the facility. *Department's Exhibit 3.*

On August 18, 1999, Mr. Witt was issued a Notice of Violation letter for failing to remove manure to prevent a discharge, failing to ensure adequate manure storage, and improper land application of manure. The letter required Mr. Witt to: (1) repair the retaining wall by October 20, 1999; (2) contact the NRCS for a facility assessment and submit the assessment to Field Office 6 by September 30, 1999; (3) notify Field Office 6 how he would comply with the assessment recommendations by September 30, 1999; and (4) remove solids from the culvert and road ditch by October 20, 1999. *Department's Exhibit 6.* On February 29, 2000, Field Office 6 personnel visited Mr. Witt's facility and observed runoff from the open feedlot to the drainage ditch and what appeared to be a pile of manure solids in the culvert. Mr. Witt failed to comply with the requirements and on March 1, 2000, Field Office 6 sent a letter repeating the requirements and provided Mr. Witt a deadline of April 15, 2000. *Department's Exhibit 8.*

On March 20, 2000, Field Office 6 received a copy of NRCS's assessment of Mr. Witt's facility. The assessment concluded that the nursery confinement buildings showed evidence of past and present manure leakage and the manure storage capacity was less than 30 days. The Cargill buildings had a manure storage capacity of 18 days. The assessment also noted that due to the location of the feedlot to the waterway Mr. Witt would be unable to construct a new waste storage structure. The NRCS made the following recommendations: (1) inspect and replace all deteriorated materials in the

nursery buildings and institute a year-round manure application plan because of the limited storage; (2) install additional liquid runoff control to assure that runoff is diverted to a grass filtering area; (3) idle some corn crop ground to ensure there was ample area to apply manure; and (4) abandon all or part of the open feedlot. *Department's Exhibit 9.*

On June 13, 2000, the Department issued Administrative Order 2000-AFO-05 to Mr. Witt. *Department's Exhibit 10.* The violations from the August 1999 investigation were cited in order and included the following: (1) failure to retain all manure from a confinement feeding operation between periods of waste disposal and failure to prevent the discharge of manure into a water of the state or into a tile line; (2) failure to remove all settleable solids from open feedlot waste prior to a discharge to waters of the state; and (3) failure to comply with general water quality regulations. The order required Mr. Witt to: (1) comply with minimum manure control requirements, (2) submit a manure management plan by July 15, 2000; (3) remove manure solids from the culvert and ditch by August 1, 2000; (4) repair the retaining wall in the open feedlot area by August 31, 2000; (5) comply with the recommendations in the NRCS "Waste Management Assessment" by October 31, 2000; and (6) pay an administrative penalty of \$3,000.00. Dan Witt appealed the order on July 13, 2000, and a contested case hearing was held on November 27, 2007. At the time of the administrative hearing Mr. Witt had discontinued his animal feeding operations and was not raising animals at his facility. The administrative law judge ruled in favor of the Department. The administrative law judge did reduce the penalty to \$1,500.00. The administrative law judge reduced the penalty by \$500.00 because Mr. Witt did obtain additional acres of land for manure application and eventually closed the entire facility. The penalty was reduced by an additional \$1,000.00 because of what the administrative law judge called a mitigating circumstance in that it was seven years between the appeal and the hearing and this time delay made it difficult for Mr. Witt to develop a defense. *See Proposed Decision.* Mr. Witt appealed the proposed decision of the administrative law judge. *See Mr. Witt's Appeal.*

STANDARD OF REVIEW

The Iowa Administrative Procedure Act states that:

On appeal from or review of the proposed decision, the agency has all the power which it would have in initially making the final decision except as it may limit the issues on notice to the parties or by rule. The agency may reverse or modify any finding of fact if a preponderance of the evidence will support a determination to reverse or modify such a finding, or may reverse or modify any conclusion of law that the agency finds to be in error. In cases where there is an appeal from a proposed decision or where a proposed decision is reviewed on motion of the agency, an opportunity shall be afforded to each party to file exceptions, present briefs and, with the consent of the

agency, present oral arguments to the agency members who are to render the final decision.

Iowa Code section 17A.15(3).

ARGUMENT

I. Whether Dan Witt failed to contain all manure from the confinement buildings at his facility.

Iowa Code section 455B.201(1) and 567 Iowa Administrative Code (IAC) 65.2(3)¹ require that all manure produced in a confinement feeding operation be retained between periods of waste disposal and prohibit the discharge of manure into a water of the state or into a tile line that discharges to a water of the state. 567 IAC 65.2(3) also requires that manure be removed from manure control facilities as necessary to prevent overflow or discharge; and that manure be removed as needed prior to periods when application cannot be conducted in order to assure that adequate capacity exists in the manure storage facilities. *Department's Exhibit #14.*

On August 9, 1999 and August 16, 1999, Field Office 6 personnel visited Mr. Witt's facility and observed a large pool of manure in a cornfield east of the facility. The corn had been burned and was yellow. During the investigations, Field Office 6 personnel observed liquid manure and manure solids in a grass waterway and in a culvert near the facility. Laboratory sample results indicated high levels of fecal coliform, ammonia, BOD, and total suspended solids. Field Office 6 personnel also observed manure overflowing from the confinement buildings onto adjacent ground. *Department's Exhibit #3.*

Furthermore, Mr. Witt stated during the August 16, 1999 visit that he only had enough storage capacity to hold manure for two weeks and that he did not own enough land to spread the manure on. *Department's Exhibit #3.* The limited manure storage capacity statement was later confirmed by the NRCS assessment conducted at Mr. Witt's facility in September 1999. The assessment stated that the confinement buildings had a manure storage capacity of less than 30 days. The assessment recommended the development of a year-round manure application plan to account for the limited manure storage structure. *Department's Exhibit #9.*

The administrative law judge stated: "The preponderance of the evidence, including the observations of DNR personnel, DNR photographs, and laboratory results, established that Appellant violated Iowa Code section 455B.201 and 567 IAC 65.2(3). ... In addition to the manure runoff from the open feedlot, there was also manure seepage from the nursery buildings...to nearby fields." *Proposed Decision Page 9.*

¹¹ The proposed decision cited the statutes and rules that were in effect at the time the Administrative Order was issued.

Field Office 6 personnel observed manure overflowing from the confinement buildings to nearby fields. Mr. Witt stated that he had limited manure storage capacity and limited cropland to land-apply manure. The NRCS confirmed the limited manure storage capacity and the need for a plan for year-round manure application. Based on the evidence, Mr. Witt failed to contain all manure from his confinement facility and the administrative law judge's findings that Mr. Witt violated Iowa Code section 455B. 201 and 567 IAC 65.2(3) should be affirmed.

II. Whether Mr. Witt failed to remove all settleable solids from the open feedlot prior to the discharge of manure?

567 IAC 65.2(1) requires that the minimum level of waste control for an open feedlot shall be the removal of settleable solids from waste prior to discharge to waters of the state. 567 IAC 65.2(7) requires wastes to be removed from control facilities and applied to land so as to not allow surface or ground water pollution. *Department's Exhibit #15.*

On June 12, 1989, Field Office 6 conducted a complaint investigation at Mr. Witt's facility and observed dry manure solids from the facility in the county road ditch and the waterway. Field Office 6 issued a Notice of Violation letter to Mr. Witt and informed him of the manure control requirements. *Department's Exhibit #11.*

On June 5, 1997, Field Office 6 conducted a complaint investigation at Mr. Witt's facility and observed a break in the corner of the open feedlot basin. Field Office 6 did not observe runoff from the basin, but in a letter dated June 30, 1997 did request that Mr. Witt repair the basin and have a NRCS assessment of the facility. Mr. Witt was once again informed of the manure control requirements. *Department's Exhibit #13.*

On August 9, 1999 and August 16, 1999, Field Office 6 conducted a complaint investigation at Mr. Witt's facility and observed manure solids from the facility in the grass waterway and in the county road culvert. The retaining wall on the south and east edge of the open feedlot were breached and manure was discharging into the culvert. Laboratory sample results from the county road ditch indicated high levels of fecal coliform, ammonia, BOD, and total suspended solids. *Department's Exhibit #3.*

Mr. Witt stated during the August 16, 1999 visit that he only had enough storage capacity to hold manure for two weeks and that he did not own enough land to spread the manure on. *Department's Exhibit #3.* The limited manure storage capacity statement was later confirmed by the NRCS assessment conducted at Mr. Witt's facility in September 1999. The assessment stated that the Cargill units had a manure storage capacity of 18 days. The assessment recommended Mr. Witt abandon the open feedlot because the location of the feedlot made the construction of proper manure storage structures impractical. *Department's Exhibit #9.*

Following the August 1999 investigation, Field Office 6 returned to Mr. Witt's facility on February 29, 2000, and observed manure runoff from the open feedlot to the drainage ditch and manure solids in the culvert. *Department's Exhibit #7.*

The administrative law judge stated: "The preponderance of the evidence established that the Appellant violated 567 IAC 65.2(1) and (7) when he failed to remove settleable solids from wastes prior to their discharge to waters of the state and when he failed to land apply wastes so as not to allow surface water pollution." *Proposed Decision Page 10.*

Field Office 6 visited Mr. Witt's facility numerous times between 1987 and 2000 and found both physical and laboratory evidence of manure solids in the county road ditch and culvert. Mr. Witt stated that he had limited manure storage capacity and limited cropland to land-apply manure. The NRCS confirmed the limited manure storage capacity and the need for Mr. Witt to abandon the current location of the open feedlot. Based on the evidence, Mr. Witt failed to remove all settleable solids from the open feedlots prior to a discharge to a water of the state and the administrative law judge's findings that Mr. Witt violated 567 IAC 65.2(7) should be affirmed.

III. Whether the discharges from Mr. Witt's facility created violations of the general water quality criteria?

567 IAC 61.3(2) provides general water quality criteria and prohibits discharges that will produce objectionable color, odor or other aesthetically objectionable conditions; settle to form sludge deposits; interfere with livestock watering; or are toxic to animal or plant life. *Department's Exhibit #16.*

On August 9, 1999, Field Office 6 investigated a complaint of manure runoff at Mr. Witt's facility. Field Office 6 personnel observed a large pool of manure in a cornfield to the east of the facility, with the first few rows of corn burned and yellow in color. Field Office 6 personnel observed manure solids in the grass waterway between the facility and the cornfield and in the county road culvert to the south of the area. The manure solids in the grass waterway had the appearance of black muck. *See photographs in Department's Exhibit #4.* A breach in the retaining wall of the feedlot was also observed and manure was being discharged into the culvert. On August 16, 1999, Field Office 6 personnel returned to Mr. Witt's facility and collected samples from the county road ditch south of the culvert. The results indicated high levels of fecal coliform, ammonia, BOD, and total suspended solids. *Department's Exhibits #3, #4, and #5.*

The administrative law judge stated: "The preponderance of the evidence established that Appellant violated 567 IAC 61.3(4) when his animal feeding facility discharged waste materials that produced sludge deposits and aesthetically objectionable conditions. The manure runoff from the Appellant's facility contained concentrations of contaminants that are toxic to microorganisms, worms, insects, frogs, fish, etc." *Proposed Decision Page 10.*

Field Office 6 observed the manure runoff creating a black sludge as it was in the grass waterway and confirmed high levels of fecal coliform, ammonia, BOD, and total suspended solids in the grass waterway. Based on the evidence, Mr. Witt violated one or more of the general water quality criteria and the administrative law judge's findings that Mr. Witt violated 567 IAC 61.3(4) should be affirmed

IV. Whether the penalty assessed by the administrative law judge is appropriate?

Iowa Code section 455B.191 authorizes the assessment of civil penalties of up to \$5,000.00 per day of violation for violations of the type cited in Administrative Order 2000-AFO-05. Iowa Code section 455B.109 authorizes the assessment of administrative penalties up to \$10,000.00 for violations of chapter 455B or rules, permits or orders adopted or issued under this chapter. 567 IAC chapter 10 was adopted to implement Iowa Code section 455B.109.

567 IAC 10.2 establishes the criteria used for determining an appropriate penalty. Chapter 10.2 assesses the violation in three main areas: cost savings through noncompliance or economic benefit, gravity of the violation, and culpability of the violation. The gravity of the violation takes into account the following: actual or threatened harm to the environment or the public health and safety; involvement of toxic or hazardous substances or the potential long-term effects of the violation; the degree to which ambient or source-specific standards are exceeded, where pertinent; federal program priorities, size of facility, or other pertinent factors; whether the violation is repeated and whether it violates an administrative or court order; whether the type of the violation threatens the integrity of a regulatory program; and expenses or efforts by the government in detecting, documenting, or responding to a violation. The culpability factor takes into consideration the following: the degree of intent or negligence. The standard of care required by the laws of the state of Iowa will be considered; whether the case involves false reporting or required information, or tampering with monitoring devices; and whether the violator has taken remedial measures or mitigated the harm caused by the violation. *Department's Exhibit #17.*

The administrative law judge stated: "At the time of the Administrative Order, the DNR properly considered economic benefit, gravity of the violation and culpability to determine an appropriate civil penalty." *Proposed Decision Page 12.* In calculating the penalty, the Department considered the factors listed in chapter 10. In looking at the gravity portion of the violations, the repeated violations at Mr. Witt's facility created a threatened harm to the environment. The water quality violations threaten the integrity of the water quality program. Field Office 6 documented high levels of contaminants in the pollutants discharged from Mr. Witt's facility. *Department's Exhibit #10.* In regards to gravity, the administrative law judge stated: "the DNR established that there was manure runoff and manure seepage from Appellant's facility, that at least some of the manure runoff reached waters of the state, and the manure is potentially toxic or harmful to animal and/or plant life." *Proposed Decision Page 12.*

In determining the gravity portion of the penalty, the Department acknowledged that Mr. Witt's actions did not involve intentional acts. However, Mr. Witt was notified repeatedly of the regulations and remedial measures. He failed to comply on a timely basis. Mr. Witt had duty to remain knowledgeable of Department's requirements and to be alert to the probability that his conduct was subject to the Department's rules. He failed to properly maintain the manure storage structures at his facility in order to not cause a water quality violation. The administrative law judge stated: "The preponderance of the evidence in the record established that Appellant was not as responsive as he should have been to the DNR's concerns and communications about manure seepage from his nursery buildings and manure runoff from his Cargill units and open feedlot." *Proposed Decision Page 12.*

The administrative law judge reduced the gravity portion of the penalty by \$500.00 based on some of the remedial measures Mr. Witt took following the DNR's investigations. In addition, the administrative law judge reduced the entire penalty by \$1,000.00 because of the length of time between the appeal of the order and the administrative hearing. *Proposed Decision Page 13.* At the March 2008, Environmental Protection Commission meeting, the Department did not recommend an appeal of the Proposed Decision because the administrative law judge reasonably weighed the violations committed by Mr. Witt with the length of delay in bringing this matter to hearing. Based on the factors in chapter 10 and the evidence in this case, the penalty assessment of \$1,500.00 in the Proposed Decision should be affirmed.

RESPONSE TO MR. WITT'S APPEAL TO THE PROPOSED DECISION

On March 7, 2007, the Director's office received an appeal from Mr. Witt. Mr. Witt states he is appealing the order. It is assumed by the Department he is actually appealing the Proposed Decision issued by the administrative law judge.

In his appeal, Mr. Witt states that he was never aware or made aware that the minimum manure control requirements were not being met. The record of this facility indicates to the contrary. Field Office 6 sent Mr. Witt at least four letter concerning manure runoff from his facility and visited the facility on at least two occasions regarding runoff from his facility.

In his appeal, Mr. Witt talks at length about a berm that his neighbor had constructed in a county road ditch. Mr. Witt claims the berm was the cause of the problems at his facility. Mr. Witt also mentions meetings with the county regarding a berm in a county road ditch. As stated in the Department's Answer filed August 3, 2007, the Department is unaware of the conversations or agreements Mr. Witt and the county had regarding the berm. On July 20, 2000, Field Office 6 did meet with Mr. Witt and county officials at Mr. Witt's facility. During the meeting, it was determined that the county would contact the neighbors regarding the berms. It should be noted that while the berm may have contributed to more water being on Mr. Witt's facility; it did not negate Mr. Witt's responsibility to properly contain the manure at his facility.

Mr. Witt's appeal along with copies of the photographs he filed on March 7, 2008 has been attached to the packet of information for the Commissioners.

Respectfully Submitted,

IOWA DEPARTMENT OF NATURAL RESOURCES

By: Kelli Brabec Book

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ATTORNEY FOR THE DEPARTMENT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was placed in the United States mail, as certified mail, postage prepaid, on May 22, 2008, addressed as follows:

Dan Witt
4010 220th Street
Clinton, Iowa 52732

Kelli Brabec Book

Iowa Department of Inspections and Appeals
Division of Administrative Hearings
Lucas State Office Building
Des Moines, Iowa 50319

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IN THE MATTER OF:)	
)	PROPOSED DECISION
DAN WITT)	
)	DIA NO: 07DNR006
)	

On June 13, 2000, the Iowa Department of Natural Resources (DNR) issued Administrative Order No. 2000-AFO-05 to Dan Witt (appellant). The administrative order required the appellant to comply with minimum manure control requirements, submit a manure management plan by July 15, 2000, remove manure solids from the culvert and ditch by August 1, 2000, repair the retaining wall in the open feedlot area by August 31, 2000, comply with recommendations in the NRCS "Waste Management Assessment" by October 31, 2000, and pay an administrative penalty of \$3,000. A hearing was scheduled for July 20, 2007, but the hearing was continued after the appellant failed to claim the certified mail sending him the notice of hearing. The second hearing date of August 20, 2007 was continued at appellant's request. The third hearing date of September 10, 2007 was continued because neither the Appellant nor the administrative law judge had received the DNR's exhibits. A telephone hearing was held on November 27, 2007 at 9:00 a.m. The undersigned administrative law judge presided. Attorney Kelli Book appeared for the DNR. Appellant Dan Witt was self-represented, although he stated that he had legal counsel, who he refused to identify, assisting and advising him.

THE RECORD

The record includes the Administrative Order; Notice of Appeal; Notices of Hearing; Continuance Order; Petition; Answer; Order Denying Motion to Dismiss and Order Rescheduling Hearing; testimony of the witnesses; the DNR's Exhibits 1-17 (see exhibit index for description) and Appellant Exhibit A (photographs numbered 1-13)

FINDINGS OF FACT

1. At the times relevant to the issuance of the administrative order, Appellant owned and operated a swine feeding facility

located at Section 31, T82N, R6E, in Clinton County, Iowa, which included two nursery units, two Cargill units¹, and an open feedlot. The facility was located north of a county highway and adjacent to a grass waterway that drained through a county culvert to the south. (Testimony of Mark Heiderscheit; Appellant; DNR Exhibits 2, 9, 10)

2. In about 1987,² Appellant constructed a concrete retaining wall along the north side of the highway in an attempt to control manure from running off his open feedlot. (See Appellant Exhibit A#1; DNR Exhibit 2) The retaining wall, which was constructed at the DNR's request, did an adequate job of retaining manure from the open feedlot until one of Appellant's neighbors built an earthen berm in the county ditch located across the highway from Appellant's facility. The neighbor's berm was apparently intended to collect runoff from the large water shed adjacent to Appellant's feedlot, and an open stand pipe was placed in the ditch to drain to field tile. (Appellant Exhibit A,##6-7; Petition; Appellant Testimony) After the berm was constructed, water backed up and flowed over Appellant's retaining wall whenever there was a significant rain event. Appellant had to repeatedly repair the resulting breaks in the retaining wall. (Appellant Exhibit A,##8-13; Testimony of Appellant)

3. On June 7, 1989, DNR Environmental Specialist Kenneth Marsengill³ was assigned to investigate a complaint of manure runoff from Appellant's open feedlot. Marsengill went to Appellant's facility and observed dried waste solids in the county road ditch and in the waterway, which was dry. On June 12, 1989, the DNR issued Appellant a Notice of Violation and directed him to submit a written waste management plan and a time schedule for its completion. (DNR Exhibit 11)

¹ A Cargill unit is an open lot where animals also have access to small structures. (Testimony of Mark Heiderscheit)

² The Appellant has provided conflicting dates for the construction of the retaining wall. In his notice of appeal, the Appellant states that he constructed the retaining wall in 1989 in response to the June 12, 1989 Notice of Violation (referenced in Finding of Fact #3). In his petition and in his testimony at hearing, the Appellant stated that the wall was built in 1987. The Appellant was not asked about this date discrepancy at the hearing, and it is not critical to the decision in this contested case whether the wall was in fact built in 1987 or in 1989.

³ Kenneth Marsengill has since retired from the DNR. (Testimony of Mark Heiderscheit)

4. Appellant's neighbor refused Appellant's requests to remove the berm. Appellant then asked the county to require his neighbor to remove the berm and arranged a meeting with the county engineer, county road supervisor, county NRCS Director, and DNR Field Officer to discuss the berm. According to Appellant, the county engineer agreed with him that the berm should be removed but the DNR's Washington Field Office told the county not to remove the berm. The DNR provided no contrary testimony to rebut Appellant's testimony concerning his repeated requests to have the berm removed. (Appellant testimony; Petition)

5. On May 16, 1997, the DNR issued Appellant a Notice of Violation for disposal of dead pigs and for waste application too close to a well. (DNR Exhibit 12) Appellant maintains that the well was actually more than 400 feet from the dead pigs or the waste application, and that the DNR had an erroneous location for the well. (Appellant testimony) Since the DNR did not produce any evidence to support the Notice of Violation, Appellant's testimony was accepted as true. DNR Exhibit 12 was given no evidentiary weight other than to establish that the DNR sent the Notice of Violation to Appellant.

6. On June 5, 1997, DNR Field Office Supervisor A.L. Goldberg investigated a complaint of runoff from Appellant's open feedlot. Goldberg did not see any runoff at the time of his investigation but did observe a breach in the southeast corner of the open feedlot's retaining wall. Based on Goldberg's evaluation, the DNR Field Office asked Appellant to contact the Natural Resource Conservation Service (NRCS) or a similarly qualified agency to perform an assessment of his operation to determine the most appropriate improvements or waste management plan and to submit the results of the assessment and a timeline for remedial actions by August 15, 1997. (DNR Exhibit 13; Testimony of Mark Heiderscheit) There is no evidence in the record to establish whether Appellant complied with this request⁴ or to indicate that the DNR did any follow-up with the Appellant to require compliance.

⁴ However, when the NRCS finally issued its evaluation report following its September 1999 assessment of the facility, it makes the following general statement: "This lot site has been looked at multiple times by NRCS personnel..." (DNR Exhibit 9, p. 2)

7. On August 6, 1999,⁵ the DNR received another complaint of manure runoff from the Appellant's facility. Environmental Specialist Mark Heiderscheit visited the facility on August 9, 1999 with a representative from the Clinton County Health Department. During a walk around the facility, Heiderscheit observed that manure from a Cargill unit at the northwest corner of the facility followed a path to a cornfield to the east. Heiderscheit observed a couple of standing pools of manure along the path. In the cornfield, Heiderscheit observed a large pool of manure in liquid form and noted that the first rows of corn had been burned and were yellow. He further noted a large amount of solids in the grass waterway. He followed the grass waterway to the road and observed solids with the appearance of black muck in the culvert. Heiderscheit took photographs to document his observations.⁶ (Testimony of Mark Heiderscheit; DNR Exhibits 1, 3, 4)

On August 16, 1999, Heiderscheit returned to Appellant's facility with Environmental Specialist Ken Marsengill, and they collected samples from the ditch where the solids were settling out between the road and the berm. They did not observe any runoff south of the berm in the grass waterway. Heiderscheit and Marsengill stopped at Appellant's house to inform him of the complaint and their earlier visit to the facility. When the DNR employees and Appellant walked around the facility together, Heiderscheit observed that the cornfield directly behind the nursery confinements had been plowed under, and that manure had been spread recently. The standing corn was covered in manure, and the field was soaked. The grass waterway had dried considerably since their earlier visit. Appellant told the DNR employees that "Mr. Krambeck" owned the cornfield, and they told Appellant that the manure had to be spread so that there was no runoff. Appellant replied that his nursery confinements had only enough storage for approximately two weeks, and he did not have the acreage to spread it. When Appellant asked if a secondary containment would work, Heiderscheit told him that was

⁵ Neither party documented what actions, if any, were taken by Appellant or the DNR in the two year time period from June 30, 1997 to August 6, 1999.

⁶ Appellant contends that his neighbor's field was planted in soybeans, not corn, at the time of Heiderscheit's visit in 1999 and suggests that Heiderscheit substituted photographs from a different property or year as exhibits 4-G and 4-H. However, Heiderscheit's contemporaneously prepared investigative report, photographs, and testimony were credible evidence of the condition of the field at the time of his visit in 1999.

one option and advised him that he should contact NRCS and have them assess the facility.

As they were leaving, the DNR employees observed that Appellant's nursery confinements were overflowing, with manure seeping out of the building onto the ground. They advised Appellant that the overflow needed to be stopped and that the matter may be referred to the DNR Central Office for enforcement action. (Testimony of Mark Heiderscheit; DNR Exhibit 3)

8. On August 17, 1999, the University of Iowa Hygienic Laboratory reported that the water samples collected from the ditch/culvert south of Appellant's facility were positive for Membrane Fecal Coliform (4000/100 mL), Ammonia Nitrogen (290 mg/L), Biochemical Oxygen Demand(5day)(1200 mg/L), and Suspended Solids (27400 mg/L). These results indicate that manure had been discharged to the waterway. These contaminants have the potential to harm microorganisms, worms, toads, frogs, and small insects, and fish. (Testimony of Mark Heiderscheit; DNR Exhibit 5)

9. On August 18, 1999, the DNR issued a Notice of Violation to Appellant, citing him for:

- Failing to remove manure from the control facilities as necessary to prevent overflow or discharge of manure, as required by 567 IAC 65.2(3)"b";
- Failing to ensure that adequate capacity exists in the manure storage structure to retain all manure produced during periods when manure application cannot be conducted (due to inclement weather conditions, lack of available land disposal areas, or other factors) and to remove the manure from the storage structure prior to these periods, as required by 567 IAC 65.2(3)"c";
- Failing to land apply manure removed from an animal feeding operation or its manure control facilities in a manner which will not cause surface or groundwater pollution, as required by 567 IAC 65.2(7).

Appellant was required to:

- Repair the retaining wall by October 20, 1999;
- Contact the NRCS or similarly qualified agency to perform an assessment of the facility to determine the most

appropriate waste management plan and report the results by September 30, 1999; and

- Remove the solids from the culvert and the ditch on the south side of the road and properly land apply them by October 20, 1999.

Appellant was further notified that the matter would be referred to the DNR central office for appropriate enforcement action. (Testimony of Mark Heiderscheit; DNR Exhibit 6)

10. Appellant contacted the NRCS and they visited his facility to perform an assessment in September 1999. The NRCS later issued a report⁷ containing the following conclusions:

- Nursery Building Waste Storage. NRCS estimated that Appellant's facility had an 18-day waste storage capacity for solids only, based on the size of the containment floor level wood pits and the animal capacity numbers. The building construction allowed liquids to runoff in the opposite direction from the solid storage area; underground tanks had storage for less than 1/2" of the liquid runoff. The NRCS recommended inspection of the pits as soon as possible, and replacement of all deteriorated materials with more durable materials. NRCS concluded that the existing short term storage was acceptable so long as Appellant followed an adequate waste utilization plan that allowed for year round manure application at acceptable rates. NRCS recommended additional liquid runoff control for the grower units to assure that runoff is diverted to a grass filtering area northeast of the buildings. NRCS concluded that it may be possible to construct a small wetland complex to further treat the runoff and to assure that no nutrient laden water is leaving the property.
- Waste Utilization. The primary problem with the existing waste utilization plan was the lack of available land for disposal during the growing season (May-Sept.). Besides the construction of long term storage, the only other option

⁷ The NRCS report is not dated so it is unclear when it was actually prepared by NRCS. However, according to Appellant's notice of appeal, the NRCS did not provide the report to him until March 18, 2000, six months after the assessment. Appellant then provided the NRCS report to the DNR. (DNR Exhibits 8, 9, 10; Notice of Appeal)

was to make more land available for summer disposal. NRCS outlined two options for land application.

- East Open Lots. The evidence suggested that numerous cracks in the concrete floor allowed liquids to seep out and come back up to the surface in low areas adjacent to the county road right of way. NRCS further noted that the lots may be subject to flooding due to an impoundment constructed by a neighboring landowner downstream and across the road. NRCS noted that it had looked at this lot site multiple times and that no new waste storage structure is practicable due to the limited distance to the natural watercourse. NRCS recommended abandonment of all or a part of the site as the most practical long-term solution.

(Testimony of Mark Heiderscheit; DNR Exhibit 9)

11. On February 29, 2000, Mark Heiderscheit stopped at Appellant's facility to conduct a follow-up investigation and observed runoff from the open lot to the drainage ditch and a large pile of what appeared to be mud in the culvert on the north side of the road. On the south side of the road, the water by the berm was clear to murky, and the water in the culvert was murky. Heiderscheit found the Appellant in one of the Cargill units and asked about the status of the NRCS report. Appellant did not respond to Marsengill's question but told Heiderscheit that he could not be in the Cargill unit without protective boots, gloves, and a protective mask. (Testimony of Mark Heiderscheit; DNR Exhibit 7)

12. As of March 1, 2000, Appellant still had not provided the DNR with a copy of his NRCS report nor had he provided documentation that he had taken the other remedial actions required by the DNR. Heiderscheit gave Appellant until April 15, 2000 to complete the work and submit the requested information. (Testimony of Mark Heiderscheit; DNR Exhibit 8)

13. On June 13, 2000, the DNR issued Administrative Order No. 2000-AFO-05, which cited Appellant for violations of Iowa Code section 455B.201(1) and 567 IAC 65.2(3); 567 IAC 65.2(1) and (7); and 567 IAC 61.3(2). Appellant was required to comply with minimum manure control requirements, submit a manure management plan by July 15, 2000, remove manure solids from the culvert and ditch by August 1, 2000, repair the retaining wall in the open

feedlot area by August 31, 2000, comply with the recommendations in the NRCS "Waste Management System Assessment" by October 31, 2000, and pay an administrative penalty of \$3,000. The civil penalty included the following assessments:

- Economic Benefit. No amount was assessed for this factor because the DNR determined that any time and money saved will likely be significantly offset by the cost of manure control requirements.
- Gravity of the Violation. \$2,000 was assessed for this factor because the statute authorizes substantial civil penalties (\$5,000 per day), and there were repeated violations that threatened harm to the environment.
- Culpability. \$1000 was assessed for culpability because Appellant was "notified repeatedly of required remedial measures but failed to comply on a timely basis."

(Testimony of Mark Heiderscheit; DNR Exhibit 10)

14. After the NRCS report was completed, Appellant made arrangements to use 15 acres belonging to a neighbor for land application of manure from his nursery buildings. Appellant removed all livestock from his open feed lot by August 2001 and began taking steps to depopulate the nursery buildings and Cargill units, but the depopulation of the facility was not completed until several years later. When the county hired a new engineer, Appellant contacted a county supervisor who convinced the new county engineer to have the neighbor's berm and standpipe moved to its present location. Appellant's facility remains empty but has not flooded since the berm and standpipe were moved. Appellant testified that in the seven years since he filed his notice of appeal on July 13, 2000, he received only two letters from the DNR. Appellant testified that he called the DNR in response to the letters, but got only "lies and innuendos." The parties agree that the only issue remaining to be resolved from the appealed Administrative Order is the propriety of the assessed \$3,000 civil penalty.
(Testimony of Mark Heiderscheit; Appellant; Petition)

CONCLUSIONS OF LAW

I. The Violations

Iowa Code section 455B.173(1999)⁸ authorizes the Environmental Protection Commission (Commission) to adopt rules establishing water quality and discharge standards, relating to the operation of disposal systems and the conditions under which the Department shall issue permits to such systems, and relating to the disposal of waste water resulting from poultry and livestock operations. The Commission promulgated rules applicable to water quality and animal feeding operations at 567 IAC chapter 60-65.

567 IAC 65.4(1)"b" authorizes the DNR to evaluate any animal feeding operation to determine if wastes from the operation are causing or may reasonably be expected to cause pollution of a water of the state. If the DNR's evaluation determines that wastes from an animal-feeding operation are causing or may reasonably be expected to cause pollution of a water of the state, the operation shall institute necessary remedial actions to eliminate the condition if the operation received a written notification from the DNR of the need to correct the condition.

A. Retention of Manure Between Periods of Waste Disposal/Prohibited Discharges of Manure to Waters of State

Confinement feeding operations are required to retain all manure between periods of waste disposal and are prohibited from discharging manure into waters of the state or into a tile line that discharges to waters of the state. Iowa Code section 455B.201(1) and 567 IAC 65.2(3). The preponderance of the evidence, including the observations of DNR personnel, DNR photographs, and laboratory results, established that Appellant violated Iowa Code section 455B.201 and 567 IAC 65.2(3) when manure runoff from his animal feeding facility went into a grass waterway and then to a ditch/culvert owned by the county. In addition to the manure runoff from the open feedlot, there was also manure seepage from the nursery buildings and manure runoff from the Cargill units to nearby fields.

⁸ This proposed decision will cite to the statutes and rules in effect at the time that the Administrative Order was issued.

B. Removal of Settleable Solids Prior to Discharge of Wastes

The minimum level of waste control for any animal feeding operation, including open feedlots, is the removal of settleable solids from wastes prior to discharge to waters of the state. 567 IAC 65.2(1). Waste control may be accomplished through the use of settling basins, terraces, diversions, or other solids settling facilities. Wastes must be removed from control facilities and applied to land so as to not allow surface or ground water pollution. 567 IAC 65.2(7). The preponderance of the evidence established that the Appellant violated 567 IAC 65.2(1) and (7) when he failed to remove settleable solids from wastes prior to their discharge to waters of the state and when he failed to land apply wastes so as not to allow surface water pollution.

C. Prohibited Discharges To Surface Waters

567 IAC 61.3(4) provides general water quality criteria applicable to all surface waters and provides that such waters shall be free from:

- Substances attributable to point source wastewater discharges that will settle to form sludge deposits;
- Materials attributable to wastewater discharges or agricultural practices producing objectionable color, odor or other aesthetically objectionable conditions; or
- Substances attributable to wastewater discharges or agricultural practices in concentrations or combinations which are acutely toxic to human, animal, or plant life.

The preponderance of the evidence established that Appellant violated 567 IAC 61.3(4) when his animal feeding facility discharged waste materials that produced sludge deposits and aesthetically objectionable conditions. The manure runoff from the Appellant's facility contained concentrations of contaminants that are toxic to microorganisms, worms, insects, frogs, fish, etc.

II. The Civil Penalty

Iowa Code section 455B.109 authorizes the Commission to establish rules for the assessment of civil penalties of up to

ten thousand dollars (\$10,000) per violation and provides that in proposing or assessing a penalty, the commission and director shall consider the costs saved or likely to be saved by non-compliance by the violator, the gravity of the violation, the degree of culpability of the violator, and the maximum penalty authorized for that violation under this chapter. Iowa Code section 455B.191 authorize the assessment of civil penalties of up to \$5,000 per day of violation for the type of violations in this case.

567 IAC chapter 10 was adopted by the Commission to implement Iowa Code section 455B.109. It establishes the criteria for screening and assessing administrative penalties. In determining whether a violation is appropriate for the administrative assessment of civil penalties, the department will consider relevant factors. The factors include, in relevant part:

- 1) Costs saved or likely to be saved by noncompliance by the violator...567 IAC 10.2(1).

- 2) Gravity of the violation, including the actual or threatened harm to the environment or to public health and safety; involvement of toxic or hazardous substances or potential long-term effects of the violation;...whether the violation is repeated and whether it violates an administrative or court order... 567 IAC 10.2(2) "a," "b," "e."

- 3) Culpability, including the degree of intent or negligence; whether the case involves the false reporting of required information or tampering with monitoring devices; and whether the violator has taken remedial measures or mitigated the harm caused by the violation. 567 IAC 10.2(3)

- 4) The maximum penalty authorized for that violation under Iowa Code chapter 455B... 567 IAC 10.2(4)

- 5) Whether the assessment of administrative penalties appears to be the only or most appropriate way to deter future violations, either by the person involved or others similarly situated. 567 IAC 10.2(5).

6) Other relevant factors which arise from the circumstances of each case. 567 IAC 10.2(6)

At the time of the Administrative Order, the DNR properly considered economic benefit, gravity of the violation and culpability to determine an appropriate civil penalty. With respect to gravity of the violations, the DNR established that there was manure runoff and manure seepage from Appellant's facility, that at least some of the manure runoff reached waters of the state, and that manure is potentially toxic or harmful to animal and/or plant life. The circumstances at the time justified the \$2,000 penalty for gravity of the violation.

With respect to culpability, the DNR conceded that Appellant's violations were not intentional. However, the DNR asserts that Appellant was still culpable because he was repeatedly notified of the remedial measures that he was required to take but failed to comply on a timely basis. The preponderance of the evidence in the record established that Appellant was not as responsive as he should have been to the DNR's concerns and communications about manure seepage from his nursery buildings and manure runoff from his Cargill units and open feed lot. It is also obvious that at some point the Appellant's attitude toward the DNR's employees became so negative that it interfered with his ability to effectively communicate his own concerns and efforts.

Nevertheless, it does appear that Appellant took some important steps to control the manure runoff from his open feedlot by constructing the retaining wall, repeatedly repairing the retaining wall when it was damaged by flooding caused by his neighbor's berm, and by repeatedly seeking to have the berm removed. The runoff from the open feedlot was either caused by or significantly aggravated by the presence of the neighbor's berm, which was out of Appellant's ability to control absent abandoning his animal feeding operation at this location. Appellant promptly contacted the NRCS to assess his facility following the issuance of the August 18, 1999 Notice of Violation, but the NRCS failed to provide him with a prompt written report. The NRCS report was eventually provided to the Appellant and the DNR, and Appellant eventually implemented the recommendations made by the NRCS. Initially, he obtained (15) additional acres to land apply the manure from his facility, and then removed all animals from his open feedlot by August 2001. Appellant eventually depopulated the entire facility. For these

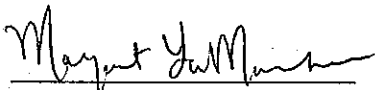
reasons, the culpability assessment should be reduced by 50% to \$500.

567 IAC 10.3(2) provides that in determining the amount of an administrative penalty, the penalty may be increased or discounted up to \$1,000 due to aggravating or mitigating factors, respectively. Appellant appealed the Administrative Order in a timely manner and then waited seven years for a hearing to be scheduled. He had only two contacts from the DNR in the interim. He came to the (not unreasonable) conclusion that the DNR had decided not to pursue collection of the administrative penalty. The delay in bringing the matter to hearing likely made it more difficult for Appellant to assemble his defense. The adjusted total penalty of \$2500 should be reduced by \$1,000 due to the delay in bringing the appeal to hearing.

ORDER

IT IS THEREFORE ORDERED that the issuance of Administrative Order No. 2000-AFO-05 to appellant Dan Witt is hereby AFFIRMED, in part, and MODIFIED, in part. The finding that the Appellant committed violations of Department statutes and rules is AFFIRMED. The \$3,000 total civil penalty is reduced to \$1,500.

Dated this 14th day of December, 2007.



Margaret LaMarche
Administrative Law Judge
Department of Inspections and Appeals
Lucas State Office Building-Third Floor
Des Moines, Iowa 50319-0083

cc: Kelli Book
Iowa Department of Natural Resources
Air Quality Bureau
7900 Hickman Road, Suite 1
Urbandale, IA 50322

[CERTIFIED]

Dan Witt
4010 220th Street
Clinton, IA 52732 (CERTIFIED)

Any party may appeal a proposed decision to the director of the department of natural resources within 30 days after receipt of the proposed decision and order. The agency may also decide on its own to review a proposed decision, notwithstanding the absence of a timely appeal by a party. 561 IAC 7.15(5)"a."

March 3, 2008

RECEIVED
MAR 07 2008
Director's Office

Director, Iowa Department of Natural Resources
Henry A. Wallace Building
Des Moines, IA 50319-0034

Dear Sir:

This petition is in reply to Administrative order #2000-AFO-05 and is a request for an appeal of such order.

The appellant was never aware or made aware that minimum manure control requirements were not being met. Attempts to discuss this with DNR field officers was met with unrelated responses concerning manure solids in the county ditch adjacent to appellant's property.

The culvert and road ditch in question, adjacent to appellant's property, was viewed simultaneously by the county road supervisor and the county engineer at the request of the appellant on July 20, 2000. The DNR field officer was also present at the time. Both county employees expressed that the ditch and culvert were not in a state of disrepair and any attempt to alter their condition would not be acceptable. They repeated their position so that both appellant and DNR field officer understood.

The retaining wall, installed in 1987 to control solid manure, functioned as intended until an earthen berm was placed across the road in the county ditch. It was built by a neighbor to collect run off from a large water shed adjacent to my livestock yards. An open stand pipe was placed in the ditch to drain to field tile. Anytime we experienced a significant rain event, the water backed up and flowed over my walls into the yards. When the volume was enough, the walls were broken compromising their purpose. This happened several times each year. The seriousness of the flooding is shown in the photos provided. They show several different floods and the berm causing them.

Attempts to repair and strengthen the wall were made but became increasingly difficult. The neighbor refused to remove the berm. I approached the county about removing it, as the berm was on county property and met with very little success. This went on for several years.

In an attempt to get the berm removed, I put together a meeting of the county engineer, county road supervisor, county NRCS Director, DNR field officer and myself at the site on July 20, 2000. The county engineer summarized the berm should be removed so I could repair my wall. He sent this out in the form of a letter. Several days later I received a call from the county engineer's office telling me they had received a call from the DNR field office in Washington instructing them not to remove the berm. That stopped any immediate chance at having the berm removed, stopping flooding and repairing the wall.


I then began plans to remove all the livestock from the site. This was not a simple task and took several years to accomplish.

Shortly after this, our county hired a new county engineer. Before the DNR could get involved, I enlisted the help of a county supervisor who convinced the county engineer to have the berm and standpipe moved to there proper and present location. The yards have not flooded since and remain empty.

This has been a long ordeal and has been greatly exaserbated by the lack of common sense exhibited by the DNR at all levels. There never was a need for an Administrative order, nor did it solve anything. This whole event should and could have been resolved amicably, at an earlier date, had the right people been involved.

Thank you for your time and consideration of this matter.

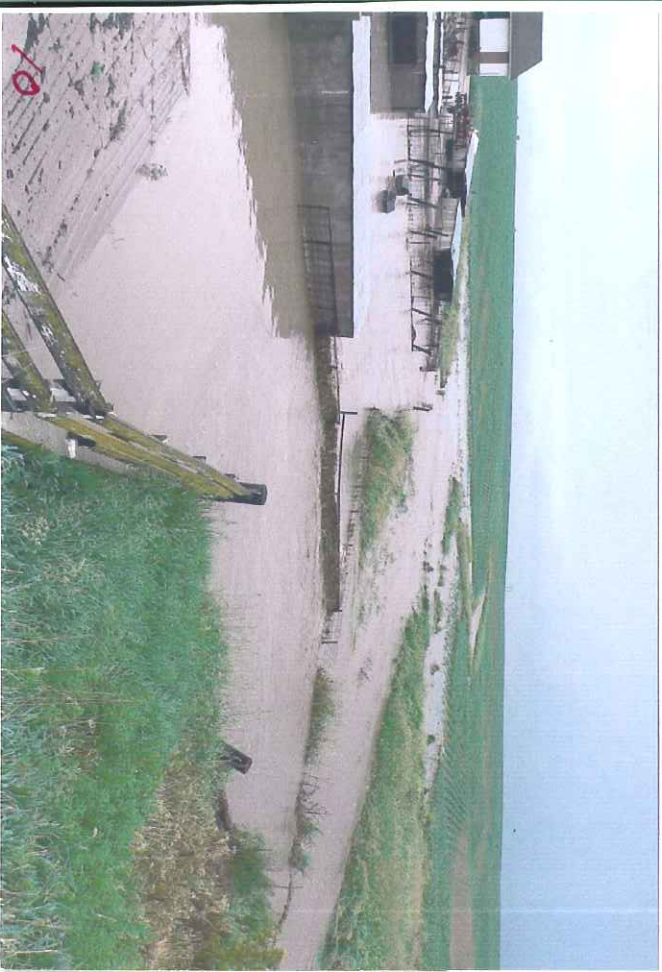
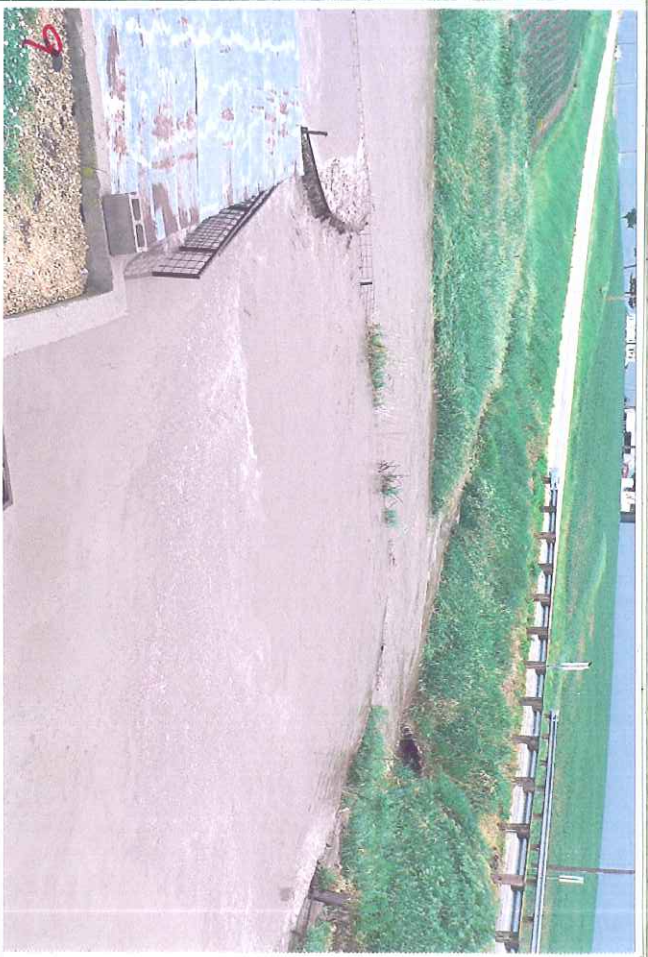
Sincerely,

A handwritten signature in cursive script that reads "Daniel Witt".

Daniel Witt
4010 220th St.
Clinton, Ia. 52732









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